

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
)  
Promotion of Competitive Networks )  
in Local Telecommunications Markets )  
)  
Wireless Communications Association )  
International, Inc. Petition for Rulemaking to )  
Amend Section 1.4000 of the Commission's )  
Rules to Preempt Restrictions on Subscriber )  
Premises Reception or Transmission Antennas )  
Designed to Provide Fixed Wireless Services )  
)  
Cellular Telecommunications Industry )  
Association Petition for Rule Making and )  
Amendment of the Commission's Rules )  
to Preempt State and Local Imposition of )  
Discriminatory And/Or Excessive Taxes )  
and Assessments )  
)  
Implementation of the Local Competition )  
Provisions of the Telecommunications Act )  
of 1996 )

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WT Docket No. 99-217

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 96-98

**COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION**

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**COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION**

The National Cable Television Association ("NCTA") hereby submits its comments on the Notice of Inquiry in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include cable operators serving more than 90 percent of the nation's 66 million cable television households, as well as most of the program networks carried by cable systems. NCTA's members also include a large number of suppliers of equipment and services to cable operators and program networks.

## INTRODUCTION AND SUMMARY

As facilities-based providers of multichannel video programming services whose facilities use public rights-of-way, cable operators have historically been required to obtain permission from state or local governments to construct their systems. In return for such permission, cable operators have been required to enter into franchise agreements that give state and local governments the right to ensure that their rights-of-way are used in a manner that protects public safety and minimizes damage and disruption.

But the conditions and requirements imposed by cable franchising authorities – and permitted by Title VI of the Communications Act of 1934, as amended – go well beyond the management of the use of public rights-of-way. For example, most cable franchises have required cable operators to extend construction of their facilities to provide service throughout their communities. They typically require operators to pay a franchise fee of five percent of their gross revenues from the provision of cable service. They require systems to provide public, educational and governmental access channels. Cable franchises have also specified requirements for facilities and equipment, although the Telecommunications Act of 1996 sharply curtailed cities’ authority to impose technical standards or to “prohibit, condition, or restrict a cable system’s use of any type of subscriber equipment or any transmission technology.”<sup>1</sup>

In granting cable operators permission to provide cable service, franchising authorities may not attach conditions or requirements that limit, restrict or otherwise affect an operators’ provision of telecommunications services.<sup>2</sup> Local governments may generally require providers of telecommunications services to obtain their permission to use public rights-of-way. But the

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<sup>1</sup> 47 U.S.C. § 544(e).

range of conditions and requirements that local governments may insist upon in return for such permission is extremely limited by the provisions of Section 253 of the Communications Act, which was added by the 1996 Act.

Section 253, with only two exceptions, flatly prohibits state and local governments from adopting any statute, regulation, or other legal requirement that “prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>3</sup> The first exception is that *states* may “impose, on a competitively neutral basis and consistent with [the universal service provisions of] section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”<sup>4</sup> The second exception is that state and local governments retain authority “to manage the public rights of way” and “to require fair and reasonable compensation from telecommunications providers, on a competitively neutral basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”<sup>5</sup>

The Commission and the courts, on a case-by-case basis, have consistently confirmed that Section 253 effectively limits local regulation of telecommunications providers to the management of the use of public rights-of-way and the collection of fair, reasonable, nondiscriminatory, and competitively neutral cost-based fees for the use of such rights-of-way. And they have made clear that, in order to implement the pro-competitive objectives of the 1996

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<sup>2</sup> 47 U.S.C. § 541(b)(3)(B).

<sup>3</sup> 47 U.S.C. § 253(a).

<sup>4</sup> 47 U.S.C. § 253(b).

<sup>5</sup> 47 U.S.C. § 253(c).

Act, this residual grant of statutory authority to manage the public rights-of-way should be narrowly construed.

For the most part, as the Commission suggests in its Notice of Inquiry, local governments have understood the public policy underlying the 1996 Act and, in any event, have recognized the limitations that the Act imposed on their authority to regulate the provision of telecommunications services. Most local governments also have recognized that they may not use their Title VI authority over the provision of cable service to regulate or impose conditions on the provision of telecommunications services by cable operators.

Nevertheless, as the experience of individual cable operators will confirm, many local franchising authorities have not understood or agreed to the preemptive message of Section 253, as confirmed by the Commission and the courts. Moreover, because it is often the courts and not the Commission that adjudicate whether particular local regulations of telecommunications providers are at odds with preemptive federal statutes and policies, each case must be litigated anew, with no assurance that every court will apply Section 253 in a manner that implements the objectives of Congress and the Commission.

Accordingly, the Commission should take this opportunity to confirm and endorse as federal policy the preemptive decisions of the federal district courts in Texas and Maryland, which have limited the regulatory authority of local governments over telecommunications providers to the management of public rights-of-way, and which have narrowly construed what it means to manage such rights-of-way.

In addition, and in furtherance of the procompetitive purposes and policies of the 1996 Act, the Commission should confirm that if cable operators provide telecommunications services over the same rights-of way and facilities that they use to provide cable service, no additional

management of the rights-of way is required. Therefore, no additional regulatory permission need be obtained from local governments, no additional conditions and requirements may be imposed, and no additional fees to compensate for the use of public rights-of-way may be required.

Finally, to the extent that fees and requirements are imposed on new entrants to manage the use of rights-of-way, the Commission should ensure that such fees and requirements are not imposed *only* on new entrants. Section 253's requirements of nondiscrimination and competitive neutrality are meant not only to ensure fair competition among competitive local exchange carriers ("CLECs") but also – and most importantly – to ensure fair competition between CLECs and incumbent local exchange carriers ("ILECs"). To subject only new entrants to regulation and fees while protecting incumbent telecommunications providers would conflict with the whole purpose of the 1996 Act.

Therefore, the Commission should ward off arguments that ILECs should be free of fees and requirements imposed by local governments on CLECs because of any supposedly unique contributions that they may have made to their communities in return for permission to use the public rights-of-way. Cable operators have, in particular, been subject to a broad array of locally-imposed obligations in order to provide cable service, and when they use the same rights-of-way to provide telecommunications services, there is no reason why they should incur additional fees or obligations in excess of those already imposed on ILECs.

**I. THE COMMISSION SHOULD CONFIRM THAT THE COURT DECISIONS NARROWLY CONSTRUING LOCAL REGULATORY AUTHORITY OVER THE PROVISION OF TELECOMMUNICATIONS SERVICES REFLECT FEDERAL COMMUNICATIONS POLICY.**

The Commission's first decisions interpreting and applying Section 253 – in particular, the decisions in *Classic Telephone, Inc.*, 11 FCC Rcd 13082 (1996) and *TCI Cablevision of*

*Oakland County, Inc.*, 12 FCC Rcd 21396, 21441 (1997) (“*TCI*”), *reconsideration denied*, 13 FCC Rcd 16400 (1998) – sent a clear, useful signal to courts and local communities regarding federal telecommunications policy and the scope of local authority under that section of the Act. Several federal courts, in preempting local regulation of telecommunications service providers, have followed, amplified and clarified the Commission’s signal. Now would be an appropriate time for the Commission, in turn, to confirm and endorse those court decisions, in order to ensure that the objectives of the 1996 Act are properly implemented in a consistent manner throughout the nation.

**A. “Managing the Rights-of-Way”**

In *TCI*, the Commission emphasized that the scope of the prohibition of Section 253(a) is broad:

In addition to outright prohibitions of entry, Section 253(a) also forbids state and local governments from enforcing any statute, regulation, or other legal requirement that has the effect of prohibiting any entity’s ability to provide any interstate or intrastate telecommunications service. In evaluating whether a state or local provision has the impermissible effect of prohibiting an entity’s ability to provide any telecommunications service, we consider whether it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>6</sup>

The Commission indicated in that decision that any local regulation that went beyond the “statutorily protected interests in managing the public rights-of-way” and created a “third tier” of regulation of telecommunications services (in addition to state and federal regulation) would be inconsistent with the objectives of the 1996 Act and impermissible under Section 253.<sup>7</sup> In other words, any local regulation that imposes more than a *de minimis* burden on telecommunications

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<sup>6</sup> *TCI*, 12 FCC Rcd at 21439 (quoting Reply Comments of Anaheim *et al.*).

providers will be deemed to “materially inhibit or limit” the ability of such providers to compete, even if it is possible to comply with the regulation. Only regulations that are directly aimed at managing the public rights-of-way are exempt from the prohibition of Section 253(a).

Thus, the Commission noted in *TCI* that it had “previously described the types of activities that fall within the sphere of appropriate rights-of-way management in both the *Classic Telephone Decision* and the *OVS Orders*, and that analysis of what constitutes appropriate rights-of-way management *continues to set the parameters of local authority*.”<sup>8</sup> As summarized by the Commission in *TCI*, those types of activities include “coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.”<sup>9</sup>

In *AT&T Communications v. City of Dallas*, 8 F.Supp.2d 582, 591 (N.D. Tex. 1998), the court determined that “Federal law therefore limits the scope of Dallas’s authority to regulate telecommunications to two narrow areas: the “management” of city rights-of-way, and the requirement of fees for use of rights-of-way.” Citing the Commission’s decisions in *TCI* and *Classic Telephone*, the court concluded that “[m]unicipalities therefore have a very limited role in the regulation of telecommunications.” *Id.*

The District Court for the Southern District of Florida echoed these determinations in *Bellsouth Telecommunications v. City of Coral Springs*, 42 F.Supp.2d 1304 (S.D. Fla. 1999). That court held that “[w]hile states may regulate universal service, protect consumers, ensure

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<sup>7</sup> *Id.* at 21441.

<sup>8</sup> *Id.* (emphasis added) (footnote omitted).

<sup>9</sup> *Id.*

quality, and protect the public safety and welfare, local governments can *only* manage the public rights-of-way, unless of course a state specifically delegated the state authority to its local governments.” *Id.* at 1307 (emphasis added). In determining what constitutes “managing the public rights-of-way” for these purposes, the court specifically relied on the Commission’s guidance in *TCI* and *Classic Telephone*. *Id.* at 1308.

Most recently, the District Court for the District of Maryland reached similar conclusions in *Bell Atlantic-Maryland v. Prince George’s County*, 49 F.Supp.2d 805 (D. Md. 1999). Following the Commission’s lead, the court narrowly construed the scope of permissible local regulation of telecommunications providers. Thus, the court concluded that “any ‘process for entry’ that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decision-makers to grant or deny permission to use the public rights-of-way “may . . . have the effect of prohibiting the ability of any entity to provide . . . telecommunications service” – and is therefore prohibited by Section 253(a), unless it constitutes management of the rights-of-way pursuant to Section 253(c). 49 F.Supp.2d at 814.

The court acknowledged that local governments are permitted to require telecommunications providers who intend to use the public rights-of-way to obtain a local franchise. But “the terms of any such franchise must be limited to the types of activities described by the FCC in *TCI Cablevision* and *Classic Telephone*, *supra*. Any attempt to regulate telecommunications companies beyond this fairly narrow scope exceeds the County’s authority under federal law.” *Id.* at 816.

These court decisions accurately reflect the language and the purposes of Section 253. Moreover, they accurately reflect the Commission’s pronouncements on the meaning of the statute and the underlying federal policy objectives. But, as the cases suggest, there continue to

be instances in which local governments exceed the narrow limits of their authority under Section 253. To ensure that the procompetitive mandate of Section 253 is properly implemented in a uniform manner by local governments and, where necessary, by the courts, the Commission should confirm that it agrees with the courts' interpretations of the statute, and that those interpretations are necessary to implement the federal policies of the 1996 Act.

**B. "Fair and Reasonable Compensation . . . for Use of Public Rights-of-Way."**

In addition to permitting local governments to "manage the public rights-of-way," Section 253(c) also allows them "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral basis, for use of public rights-of-way on a nondiscriminatory basis." The court in *Prince George's County* addressed this provision, too, and concluded that it narrowly limits the fees that may be imposed. The court held that franchise fees "must be directly related to the companies' use of the local rights-of-way," and that, therefore, "local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way." *Id.* at 817.

According to the court,

the appropriate benchmark is not the 'value' of [the provider's] 'privilege' of using the County's public rights-of-way to provide telecommunications services . . . . Rather, the proper benchmark is the cost to the County of maintaining and improving the public rights-of-way that Bell Atlantic actually uses. Furthermore, to be 'fair and reasonable,' these costs must be apportioned to Bell Atlantic based on its degree of use, not its overall level of profitability.

*Id.* at 818.

These conclusions were based both on the procompetitive purposes of the Act and on the specific legislative history of the Section 253. As the court reasoned,

[i]f local governments were permitted under section 253(c) to charge franchise fees that were unrelated either to a telecommunications company's use of the public rights-of-way or to a local government's costs of maintaining and improving its rights-of-way, then local governments could effectively thwart the [Telecommunications Act's] pro-competition mandate and make a nullity out of section 253(a).

*Id.* at 817.

This reasoning is correct. The essence of Section 253 is that local governments may not impose conditions or requirements on telecommunications providers in return for granting permission to use the public rights-of-way unless those conditions and requirements are necessary to the management of those rights-of-way.

Sometimes, when they are acting in a “proprietary” – rather than a governmental – capacity, local governments simply charge what the marketplace will bear for the right to use space in their buildings or other property for commercial purposes.<sup>10</sup> But the point of Section 253 is precisely to preempt the government from acting in a “proprietary” capacity with respect to the use of public rights-of-way by telecommunications providers. Section 253 limits the government's role to the *governmental* function of *managing* the use of the public rights-of-way – not raising revenues from such use (or regulating the services provided over the rights-of-way). And, therefore, the “fair and reasonable” compensation to which the government is entitled in return for the use of the rights-of-way must be limited to the costs incurred by the government in performing that governmental function.

Again, to ensure that this federal policy directive is clear to local governments – and to courts reviewing complaints of excessive fees – the Commission should expressly endorse the

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<sup>10</sup> See, e.g., *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767 (2d Cir. 1984) (regarding fees for placing newsracks in publicly owned commuter train stations).

*Prince George's County* decision. The Commission should make clear that, as the agency charged with interpreting and construing the provisions of the Communications Act, it agrees with the court's interpretation that fees in excess of the incremental costs incurred in managing and maintaining the rights-of-way used by a telecommunications provider are preempted.

**II. WHEN CABLE OPERATORS PROVIDE TELECOMMUNICATIONS SERVICES USING THE SAME RIGHTS-OF-WAY THAT ARE USED TO PROVIDE CABLE SERVICES, NO ADDITIONAL LOCAL REGULATION OR FEES ARE PERMISSIBLE.**

The principles discussed in Part I, *supra*, apply generally to the local regulation of all providers of telecommunications services. From these principles, some corollaries can be derived regarding, specifically, the local regulation of the provision of telecommunications services by cable operators.

Cable operators are rapidly deploying advanced broadband facilities that are capable of providing telecommunications services in addition to video programming and other cable services. To provide cable service, an operator must obtain a franchise from its local franchising authority, pay a franchise fee of up to five percent of gross revenues from the operation of the system to provide cable service, and comply with an array of regulatory obligations authorized or required by Title VI of the Act. What additional local obligations may be imposed if, using the same facilities and rights-of-way, the operator seeks to provide telecommunications services?

The answer that follows from the principles set forth by the Commission and the courts, as discussed above, is that *no* additional obligations may be imposed in such circumstances. The Commission should confirm that this is the case. Local governments may impose any regulations necessary to manage the use of their rights-of-way. But if cable operators' use of rights-of-way to provide telecommunications services imposes no incremental burden on the

rights-of-way that are already being used to provide cable service, no additional regulation should be necessary to manage the rights-of-way.

Local governments have *already* authorized cable operators to use the public rights-of-way for the provision of cable service.<sup>11</sup> And, presumably, they are already imposing any requirements that may be necessary to manage that use of rights-of-way. Unless they can demonstrate that, as the result of the incremental provision of telecommunications services over the same facilities and rights-of-way, the existing regulations are no longer sufficient to implement the limited managerial functions identified in *Classic Telephone*, there is no basis for any new or additional regulation.

Nor is there any basis for the imposition of any additional *fees*. If (1) the only fee that local governments may require, under Section 253, for the use of rights-of-way to provide telecommunications service is an amount that compensates for any incremental costs of managing and maintaining such rights-of-way that are incurred *because of* the provision of such service; and (2) the provision of telecommunications service imposes no incremental burdens on the rights-of-way and no costs of managing and maintaining the rights-of-way in excess of those already imposed by the provision of cable service; then it follows that (3) no franchise fee or other compensation in addition to the franchise fee already authorized pursuant to Title VI may be required in connection with the provision of telecommunications services by cable operators.

In the absence of any incremental burdens on the rights-of-way and any incremental costs of managing the use of the rights-of-way, the imposition of any additional fees on cable telephony providers would be in direct conflict with the pro-competitive purposes and policies of

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<sup>11</sup> Indeed, the local franchise may already generally authorized the cable operator to use the public rights-of-way without limiting such use to the provision of cable service, in which case, wholly apart from section 253, no additional franchise would be required for the provision of telecommunications services.

Congress and the Commission. Such fees would have no function related to the management of rights-of-way and, while enriching local governments, would simply add to the costs of entering the business of providing competitive telecommunications services. This is exactly the sort of barrier to entry that Section 253 was meant to prohibit.

### **III. LOCAL GOVERNMENTS MAY NOT DISCRIMINATE IN FAVOR OF INCUMBENT TELECOMMUNICATIONS PROVIDERS.**

In any general statement of principles regarding permissible regulation of local rights-of-way, the Commission should emphatically reaffirm the fundamental rule that local regulation must be competitively neutral and nondiscriminatory. And it should restate its previous statement of the obvious – *i.e.*, that “[l]ocal requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.”<sup>12</sup>

In the past, local governments have not generally regulated or imposed fees for the use of rights-of-way by incumbent telecommunications providers – either because they saw no need to manage such use, or because their states chose not to delegate such regulatory authority to them. The Commission has rightly advised that “governments that have historically refrained from engaging in substantive telecommunications regulation should not view new entrants as being more susceptible to regulation than the incumbents.”<sup>13</sup> The fact that they have refrained from regulating the incumbents suggests that there is no need to manage their use of rights-of way – in which case, there should be no unique need or justification for managing new competitors’ similar use of rights-of-way.

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<sup>12</sup> *TCI, supra*, 12 FCC Rcd at 21443.

<sup>13</sup> *Id.*

If, on the other hand, the prospect of multiple providers of telecommunications services presents new issues regarding the management and coordination of the use of rights-of-way, any newly required regulations should apply to incumbent telephone companies as well as new entrants. Regulations and fees must, in any event, be directly related to and justified by necessary management of the rights-of-way. There is no apparent reason why, in managing and coordinating the use of rights-of-way by new entrants and incumbents, only the new entrants should be burdened with regulations and fees. To the contrary, in light of the procompetitive mandate of the 1996 Act, the Commission should make clear – again – that any such singling out of new entrants would be a prohibited barrier to entry under Section 253.

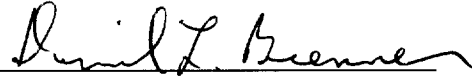
### **CONCLUSION**

Section 253 is critically important in fostering competition among telecommunications providers. Congress recognized a limited role for local governments in managing the rights-of-way used to provide telecommunications services. But it understood that any additional regulation and fees would only result in barriers to entry and impediments to competition. The Commission has rightly warned against the imposition of any such “third tier of regulation,” and the courts have followed the Commission’s lead in narrowly construing the scope of local governmental authority.

Still, there are instances of overreaching by local governments, and it would be useful for the Commission, in this proceeding, to reaffirm the principles embodied in Section 253 and to confirm that local authority is narrowly constrained. In particular, the Commission should endorse the judicial decisions that have adopted and elaborated on these principles. It should make clear, in addition, that when these principles are applied to the provision of telecommunications services by cable operators over rights-of-way that are already used to provide cable service, no additional regulations or fees are justified or permitted. Finally, the

Commission should reaffirm that singling out new telecommunications entrants for regulations and fees while exempting incumbents would be at odds with Section 253's requirements of nondiscrimination and competitive neutrality – and with the procompetitive objectives of the Act.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Daniel L. Brenner", is written over a horizontal line.

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